No. 13,141

IN THE

United States Court of Appeals

For the Ninth Circuit

Fibreboard Products Inc.,
a Corporation, et al.,
Appellant,

vs.

W. H. Townsend,
Appellee.

Petition of Appellant Fibreboard Products Inc. for Rehearing

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TABLE OF CASES

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Appellant Fibreboard Products Inc. respectfully petitions for a rehearing of this Court's decision of February 2, 1953.

The opinion of Judge Harrison holds that the contract is not of a kind falling within the Statute of Frauds. But that is not the decision of the Court on this vital point, because the opinion of Judge Pope, concurred in by Judge Healy, holds that the contract is one falling within the Statute.

The majority opinion then holds that despite the fact that the contract does come within the Statute of Frauds, appellant is estopped to rely on the Statute. The basis of the

alleged estoppel is important, in perceiving what we respectfully submit is the clear error in the decision. The basis of the estoppel, according to this court's decision, is that appellee changed his position in reliance upon an oral promise of appellant.

The Court's opinion is clear and specific as to both elements in this supposed estoppel—(1) what the oral promise was, and (2) what the change of position was.

The change of position, as clearly stated in the opinion, is that appellee gave up a job in Alabama and removed himself and his family to California.

In order for this to be in reliance on a promise, it would have had to occur after the promise was made, not before. But what was the alleged promise? The promise is said to be the oral contract of employment, which would have been wholly valid and enforceable as a contract but for the Statute of Frauds.

Thus, the majority opinion states:

> "The facts here found disclose that Townsend was induced by Fibreboard seriously to change his position *in reliance on the promises which made up the contract,* and now to deny enforcement of the contract would result in unconscionable injury to the appellant." (Opinion, p. 6)

The legal rationale is that the Statute of Frauds, the one obstacle to enforcement of the contract, is removed by the element of reliance.

But the facts do not support the application of this doctrine here. The Court's opinion makes clear that there was no such contract until *after* appellee had come to California. Thus, the opinion of Judge Harrison succinctly states—and Judges Pope and Healy concur—that

> "* * * the contract of employment was not made sufficiently specific to be enforceable until the conversation of November 15, 1948 * * *" (Op., 3)

This conversation occurred *after* appellee had come to California. At the time appellee presented himself to appellant in California on November 15, 1948, appellee admittedly had no contract.

On the face of the opinion, then, this is not a case coming within the rationale of the estoppel principle upon which the majority opinion rests itself. The acts said to constitute reliance on a contract could not have been such, for there was no contract. No California decision has ever held that reliance on a promise can create an estoppel to set up the Statute of Frauds when the promise falls short of being a legal contract, not merely because of the Statute of Frauds, but because of other vital deficiencies as well.

On the contrary, the very case which the Court relies upon in its decision for the rule of estoppel, *Monarco v. Lo Greco,* 35 Cal. 2d 621, 220 P.2d 737, shows it to be the law of California that, to work an estoppel against the application of the Statute of Frauds, the changes of position must have occurred in reliance upon a prior promise forming part of a contract which was complete, at or before the time the changes in position occurred, in every respect but failure to be in writing. Earlier cases also demonstrate this to be the law.

Thus, the part performance by a lessee which precludes assertion of the plea of the Statute of Frauds must occur while the lease is in effect and not simply in anticipation of a promised extension. *Paul v. Layne-Bowler Corp.,* 9 Cal. 2d 561, 71 P.2d 817.

Perhaps it may be countered that this Court relied on another supposed change of position, namely, in the words of Judge Harrison, that appellee "* * * worked for nine months at an inferior job * * * pursuant to an express understanding that he would do so as a part of his arrangement for a permanent job." (Op., 4)

We do not believe that the Court included this item as an element of the estoppel, because otherwise the Court would have been finding a fact in contradiction to an express finding of the Trial Court, whose judgment it affirms, and this would have been in excess of its functions as an appellate court.

What the Trial Court found was that "* * * pending the opening of the defendant's paper pulp mill, said defendant would *endeavor to find* other employment for plaintiff." (Tr., 32) As this Court has said (*De La Rama SS Co. v. Peirson,* 174 F.2d 84 (per Pope, J), statements of this character fall far short of a contract. (Cf. fn. 1, p. 86) No finding of the Trial Court states directly or by any inference that appellant ever promised that prior to the completion of the pulp mill it would employ appellee for any period or in any capacity, or that acceptance of temporary employment by appellee for appellant at another job was a prerequisite or condition of any later employment at the pulp mill.

The Trial Court made no findings on the issue of estoppel. It found that the several acts of appellee which this Court holds constitute estoppel to rely on the Statute of Frauds simply constituted consideration sufficient to take the case out of the rule that a contract of employment for a reasonable time is terminable at will.

The record in this case *presents the very situation for which the Statute of Frauds was designed.* The finding of the oral promise here depends solely upon the uncorroborated testimony of appellee concerning the statements alleged to have been made in an office interview in California on November 15, 1948, after the change of position. Let it be assumed that this promise was made, as the Trial Court found; the Statute of Frauds always does assume that there is sufficient evidence to support a finding that a contract was made, but nevertheless refuses to let it be enforced because of the possibility of fraud. Such is its very purpose and reason.

To recapitulate, and to point to the precise error in misapplying California law, we submit that the Court overlooked the distinction between two different doctrines, one having to do with what will constitute a contract, and the other having to do with what will constitute estoppel to rely on the Statute of Frauds where a contract otherwise exists. More specifically, there is a principle that certain detriments may serve as contractual consideration which, when added to the promise to render services, can take a case out of the rule that a contract for permanent employment is terminable at will; there is another principle that a serious change of position in reliance on a contract can produce an injury unconscionable enough to estop the plea of the Statute of Frauds.

Where the first principle applies, the contract becomes mutually binding by reason of the acts which constitute the detriment. But under the second doctrine (from the *Monarco* case), the acts of detriment, i.e., the acts in reliance on a contract, must be performed after the contract goes into effect and while it is in effect.

We submit that in order to conform to California law a rehearing should be granted and that the judgment of the Trial Court should be reversed.

Dated: February 27, 1953.

Respectfully submitted,

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CERTIFICATE OF COUNSEL

I hereby certify that in my judgment the foregoing petition for rehearing is well founded and that it is not interposed for delay.

Samuel L. Holmes.